N. H. 533, 32 Atl. 828, 31 L. R. A. 698, 68 Am. St. Rep. 695; *Gallagher* v. *Shipley*, 24 Md. 418, 429, 87 Am. Dec. 611. See *Fay* v. *Muzzey*, 13 Gray, 53, 56, 74 Am. Dec. 619 (2); *Fletcher* v. *Herring*, 112 Mass. 382, 384. It may be that if a question of apportionment were before us it would be proper to take into account, on the defendant's side, that the milk sold from the farm was a substantial drain on the land, but we have to consider only whether it appears that the plaintiff could recover nothing, as a matter of law. On the facts stated he had a right, if not to the whole pile of manure, to some ascertainable proportion of it which could be measured off to him. The defendant prevented him from taking any part, and claimed the whole. It was going too far to say that the plaintiff could recover nothing. *Pickering* v. *Moore*, 67 N. H. 533, 536, 32 Atl. 828, 31 L. R. A. 698, 68 Am. St. Rep. 695."

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MORTGAGES — FORECLOSURE — ORDER OF PUBLICATION.—The grantee of a purchaser at a foreclosure sale cannot, because of the insufficiency of the affidavit for service by publication, be dispossessed, or the judgment or decree of foreclosure be set aside by a court of equity at the instance of one claiming under the mortgagor by a deed subsequent to the mortgage, which remains unpaid. The latter is only entitled to be let in to make any equitable defense which he may have. *Romig* v. *Gillett* (Nov. 17, 1902), 23 Sup. Ct. 40.

Though the use of mortgages in Virginia is very limited, owing to what are considered the superior advantages of deeds of trust, the foregoing case is valuable, not only as a recent adjudication from a high source upon the general principle under consideration, but also because of its specific ruling upon an important point in Virginia practice—the effect of an insufficient order of publication upon the rights of the persons thereby summoned and of those claiming title under the proceeding. The point may arise and the ruling, therefore, be pertinent in any proceeding where similar conditions exist, and is of special interest in inquiries as to the validity of a title to real estate derived through a judicial sale. The statute of Oklahoma is substantially like section 3230 of the Code of Virginia, and authorizes service by publication where any or all of the defendants reside out of the territory or where by due diligence, plaintiff has been unable to make service within the territory. In the principal case, however, the affidavit for service by publication alleged the non-residence of the defendants simply upon information and belief, and not positively. It was contended that, because of this insufficiency, the defendant was not brought into court and the judgment and all subsequent proceedings were, as to her, absolutely void. The Supreme Court of Oklahoma sustained the contention, but its ruling was reversed, Mr. Justice Brewer, speaking for a unanimous court, saying:

"But while the affidavit for publication may have been insufficient, we are unable to concur with the Supreme Court of Oklahoma in its conclusions. A publication of notice was in fact made, and a publication based upon an affidavit which, however defective it may have been, was intended

to be in compliance with the statute. It was approved by the court, which upon it rendered a decree of foreclosure, which was executed by the proper officers in the proper way. By virtue of the proceedings the mortgagee was put into possession—a possession which he tranferred to the appellant Harding. Under those circumstances, what right has the appellee, a grantee from the mortgagor? The foreclosure was a proceeding in equity, although its various steps were prescribed by statute. Equitable principles must control the measure of relief. Even if the publication had been founded upon an affidavit perfect in form, and the decree and all proceedings had been in strict conformity to the statute, yet, by section 3955, the defendant would be let in to defend, upon compliance with certain conditions."

An important ruling, not noted in the syllabus, should not escape attention. It was contended for the appellant that the affidavit for publication, even if insufficient for the reason assigned, was good because the statute gave a separate ground for service in that manner where "the plaintiff by due diligence is unable to make service within the territory," and that the affidavit stated this fact positively, therefore the publication, judgment and all subsequent proceedings were valid. Upon this point the court said:

"It may well be doubted whether this contention of appellants can be sustained, at least in cases like this of direct, and not collateral, attack, even if the inability to obtain personal service by the exercise of due diligence is a distinctive ground for service by publication. It would seem that the facts tending to show such diligence should be disclosed, and that an affidavit merely alleging inability was one of a conclusion of law, and not of facts. *McDonald* v. *Cooper*, 32 Fed. 745; *Carleton* v. *Carleton*, 85 N. Y. 313; *McCracken* v. *Flanagan*, 127 N. Y. 493, 28 N. E. 385; *Ricketson* v. *Richardson*, 26 Cal. 149; *Braly* v. *Seaman*, Cal. 610; *Kahn* v. *Matthai*, 115 Cal. 689, 47 Pac. 698; *Little* v. *Chambers*, 27 Iowa, 522; *Thompson* v. *Shiawassee County Circuit Judge*, 54 Mich. 236, 19 N. W. 967; *Alderson* v. *Marshall*, 7 Mont. 288, 16 Pac. 576. Nor is this inability shown by the mere fact that a summons issued to the sheriff of the county in which the land is situated is returned not served, for in cases of this kind, by section 3934, a summons can be issued to and served in any county of the territory."